LIBRARY
SUPREME COURT, U. S.

MAR 11 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1220

AMERICAN AIRLINES, INC.,
Petitioner,

—against—

ELIZABETH ANNA EGAN and JOHN H. SEITER, as Administrators of the Estate of EILEEN M. SEITER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

JOHN J. MARTIN
WILLIAM M. KEEGAN
Counsel for Petitioner
99 John Street
New York, N. Y. 10038

BIGHAM, ENGLAR, JONES & HOUSTON
ROBERT F. EWALD
Of Counsel

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	3
QUESTIONS PRESENTED FOR REVIEW	3
TREATY INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	7
CONCLUSION	14
APPENDIX:	
A—Extract from the Convention for Unification of Certain Rules Relating to International Transportation by Air, and Additional Protocol, signed at Warsaw, Poland, on October 12, 1929	1a
B—Order of Remittitur, dated December 28, 1967, of the Court of Appeals of the State of New York	5a
C—Opinion of the Court of Appeals of the State of New York	8a
D—Opinion dated October 28, 1964 of Mr. Justice Brenner, Supreme Court of the State of New York, County of Kings, on Original Motion	21a
E—Opinion dated September 10, 1965 of Mr. Justice Brenner, Supreme Court of the State of New York, County of Kings, on Renewal of Original Motion	25a

PAGE

F—Memorandum Opinion dated July 5, 1965, of the Supreme Court of the State of New York, Appellate Division, Second Department..... 28a

Cases Cited

Amiable Isabella, The, 19 U. S. (6 Wheat) 1 (1821)...12, 13

Factor v. Laubenheimer, 290 U. S. 276 (1933)..... 12

Garcia v. Pan American Airways, 269 App. Div. 287, 55 N. Y. S. 2d 317 (2d Dept. 1945), aff'd. 295 N. Y. 852, 67 N. E. 2d 257 (1946), motion den. 295 N. Y. 981, 68 N. E. 2d 59 (1946), cert. den. 329 U. S. 741 (1946) 11, 12

Grey v. American Airlines, Inc., 227 F. 2d 282 (2d Cir. 1955), cert. denied, 350 U. S. 989 (1956), affirming 95 F. Supp. 756 (S. D. of N. Y. 1950)..... 9, 11

Lisi etc. v. Alitalia-Linee Aeree, Italiane, S.p.A., 370 F. 2d 508, cert. granted 389 U. S. 926..... 3, 7

Manufacturers Hanover Trust Co. v. American Airlines, Inc., 23 A. D. 2d 832..... 11

Maximov v. United States, 373 U. S. 49 (1962)..... 13

Mertens v. Flying Tiger Line, Inc., 341 F. 2d 851.... 7, 8

Preston v. Hunting Air Transport, Ltd., 1956 U. S. Av. R 1 (Q. B. D. 1956)..... 11

Ross v. Pan American Airways, 299 N. Y. 88..... 11

Samann v. C. I. R., 313 F. 2d 461 (4th Cir. 1963)..... 11

Samuel Montague & Co. v. Swiss Air Transport Co (1966), 1 Lloyds Rep. 323..... 11

Seth v. British Overseas Airways Corporation, 329 F. 2d 302 (1st Cir. 1964), cert. denied, 379 U. S. 858 (1964) 11

PAGE

Warren v. Flying Tiger Line, Inc., 352 F. 2d 494.... 8

Wyman v. Pan American Airways, 181 Misc. 963, 43 N. Y. S. 2d 420 (Sup. Ct. N. Y. Co. 1943) affd. 267 App. Div. 947, 48 N. Y. S 2d 459 (1st Dept. 1944), app. den. 267 App. Div. 983, 49 N. Y. S. 2d 271 (1st Dept. 1944), cert. den. 324 U. S. 882 (1945) 11

Other Authorities Cited

Drion, Limitation of Liabilities in International Law Sect. 251 (1954)..... 11

Goedhuis, National Air-legislation and the Warsaw Convention 156-7 (1937)..... 11

IIème Conference Internationale De Droit Prievè Aérien, ICAO Doc. 7838 (1930):

page 129 10

page 168 ..... 10n

I International Conference on Private Air Law, ICAO Doc. 7686—LC/140 pp. 65-91 (1955)..... 10n

Northwest Airlines Inc. Local and Joint International Passenger Rules and Regulations Tariff No. 2 filed with the Civil Aeronautics Board under ATB No. 23 C.A.B. No. 81..... 13

Shawcross and Beaumont, Air Law Sec. 406 (2d ed. 1951) 11

49 Stat. 3000; T.S. 876.....2, 2n, 3, 8-11, 1a-4a

United States Constitution, art. VI sec. 2..... 11

28 U. S. C. Section 1257(3)..... 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

AMERICAN AIRLINES, INC.,

Petitioner,

—against—

ELIZABETH ANNA EGAN and JOHN H. SEITER,
as Administrators of the Estate of EILEEN M. SEITER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

To the Honorable Chief Justice and the Associated Justices of the Supreme Court of the United States

American Airlines, Inc., respectfully prays that a Writ of Certiorari issue to review the order (Appendix 5a) of the Court of Appeals of the State of New York entered in the above entitled cause on December 28, 1967.

Opinions Below

This matter began in the Supreme Court of the State of New York, County of Kings, when that court rendered an Opinion (R 56-59) denying the part of the Respondents' motion seeking to strike the Petitioner's defense based upon the limitation of liability provisions of the Convention for Unification of Certain Rules Relating to International Transportation by Air, and Additional Protocol, signed at Warsaw, Poland, on October 12, 1929, otherwise known and hereinafter referred to as the Warsaw Convention).[1] Such denial was noticed by the Respondents for an appeal to the Appellate Division of the Supreme Court, Second Department, but before the appeal was perfected the Respondents renewed their motion in the County Court upon the basis of newly discovered evidence. The court in an opinion (R 97-99) granted the motion to renew but adhered to its original decision. Such decision was also appealed.

The Appellate Division, Second Department, in a Memorandum Decision (R 103-104) dismissed the first appeal holding that it was merged into the second appeal and then unanimously affirmed the second appeal.

The Respondents obtained leave to and appealed to the Court of Appeals of the State of New York which court by an Opinion[2] (Appendix 8a) dated December 28, 1967, reversed the lower Courts and struck out the defense based upon the Warsaw Convention. The basis for the reversal was the court's conclusion that the ticket involved did not give sufficient notice that the rules of the Warsaw Convention relating to the limitation of liability

---

1 49 *Stat.* 3000; T.S. 876.

2 21 N. Y. 2d 160.

were applicable. This basis was not raised in the lower courts but was injected into the case after a similar ruling in the case of *Lisi etc.* v. *Alitalia-Linee Aeree, Italiane, S.p.A.*, 370 F. 2d 508, cert. granted 389 U. S. 926, based upon similar tickets.

Statement of Jurisdiction

The order of the Court of Appeals of the State of New York, which is sought to be reviewed, was dated December 28, 1967, and was entered on the same day.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

Questions Presented for Review

1. Does the Warsaw Convention, a treaty of the United States, require that notice of the legal limitation of an air carrier's liability for the death of a passenger be given to the passenger before it becomes binding, other than as is set forth in the tickets issued which were in a form approved by the Civil Aeronautics Board, the United States agency governing civil aviation?

2. Does the Court of Appeals of the State of New York have the right by judicial fiat to abrogate and rewrite the terms of the Warsaw Convention, a treaty of the United States?

Treaty Involved

The provisions of the Warsaw Convention (49 Stat. 3000; T.S. 876) involved are Articles 3, 4, 8 and 9. The full text of these articles are printed at pages 1a to 4a of the Appendix.

Statement of the Case

The Respondents as Administrators of the Estate of Eileen M. Seiter brought an action (R 20) against the Petitioner, American Airlines, Inc., to recover for the decedent's death while a passenger on board the Petitioner's aircraft which crashed into the East River on February 3, 1959, during an approach into La Guardia Airport, New York City.

The action was subsequently consolidated with an action commenced by the Respondents against Kollsman Instrument Corporation, manufacturer of certain instruments on the aircraft, and Lockheed Aircraft Corporation, manufacturer of the aircraft. Such part of the consolidated action is not involved here.

In the action the Petitioner's Answer (R 25) pleaded as an affirmative defense that the limitation of liability provisions of the Warsaw Convention were applicable. The Respondents (R 5) moved on September 23, 1964, to strike, among others, such defense as being insufficient in law and fact. The Respondents' principal arguments were that (1) there was no "international transportation" because of a break in the transportation and (2) that the facts showed an intent on the part of the decedent not to be bound by the Warsaw Convention. The Supreme Court of the State of New York, County of Kings, (R 56) denied such part of the motion.

The facts presented on the motion developed that on January 23, 1959, the decedent went to the Bay Ridge Travel Bureau in Brooklyn, New York, and purchased tickets for cash for air transportation via various successive carriers from New York City to Vancouver, British Columbia, Canada, and return. The travel bureau issued Northwest Airlines tickets (R 14) under which the de-

cedent was to fly to Vancouver on January 26, 1959, and return on February 3, 1959.

The Northwest Airlines tickets show that the place of departure and the destination of the transportation as "NYC" with an agreed stopping place in Canada. Both the United States and Canada are parties to the Warsaw Convention. The tickets bear the C.A.B. approved notice (R 14) as to the applicability of the Warsaw Convention but such notice, as indicated above, was not at issue in any court until the Court of Appeals decision.

The decedent used her tickets to get to Vancouver on January 26, 1959, as scheduled. The decedent was to depart Vancouver on her return trip on February 3, 1959, at 6 A.M. aboard United Air Lines Flight 390 to Seattle. That flight was cancelled because of inclement weather (R 42) and the decedent travelled to Seattle by bus. She presented herself at the Northwest ticket office for the continuation of her return flight to New York City under her tickets and, at the same time, obtained an involuntary refund check (R 16) for the unused Vancouver Seattle portion of the ticket. She boarded her scheduled Northwest flight to Chicago but this flight was delayed in its arrival at Chicago and decedent was unable to make the connection with her scheduled Northwest flight to New York (R 42). Northwest then arranged space for her on American Airlines flight 320 to New York and, without the payment of any additional money, issued an exchange ticket for transportation to New York on American flight 320. Such flight crashed during the approach into La Guardia Airport and the decedent was killed.

The Respondents appealed (R 1) to the Appellate Division of the Supreme Court, Second Department, from the denial of the striking of the defense but before perfecting their appeal renewed their motion on the basis of

claimed newly discovered evidence as to the intent of the decedent in the form of two policies of flight insurance purchased by her. The first policy (R 69, 78) was purchased at New York on January 26, 1959, the date of the flight to Vancouver. It was for $25,000 and included coverage for her round trip between New York and Vancouver. The second policy (R 80) was purchased at Seattle on February 3, 1959, and insured her in an amount of $50,000 on her flight from Seattle to New York.

The Supreme Court, Kings County, (R 97) adhered to its original decision stating that the policies, especially the second, could have no effect on the "international transportation" aspect of the flight. Such decision and order entered thereon was also appealed (R 61) to the Appellate Division, Second Department.

The Appellate Division, Second Department, by a Memorandum Decision (R 103-104) dismissed the first appeal holding that it had been merged into the second appeal. The second appeal was unanimously affirmed.

The Respondents appealed to the Court of Appeals of the State of New York. That court (Appendix 8a) reversed the lower Courts and dismissed the defense of limitation of liability based upon the Warsaw Convention. The Court of Appeals in its opinion (Appendix 8a) agreed with all of the Petitioners' arguments as to the "international transportation" aspect of the flight but reversed on the basis that the ticket involved did not give sufficient notice that the rules of the Warsaw Convention relating to the limitation of liability were applicable. It held that while there was "literal" compliance with the Warsaw Convention it did not give sufficient notice. The order remitted the case to the Supreme Court, Kings County for further proceedings in accordance with the opinion. The action is presently on a trial calendar being held in abeyance pending this Petition.

ARGUMENT

(1)

The decision of the Court of Appeals of the State of New York and the order entered thereon have placed the Petitioner in a position where its rights can only be protected by this Court.

The action, as indicated above, is on the trial calendar. In the event of a trial the defense of the limitation of liability under the Warsaw Convention has been removed from the action by the Court of Appeals. The principal basis for the Court of Appeals action, however, is the *Lisi* case, *supra,* which is on *certiorari* to this Court. If this Court should reverse the *Lisi* decision the only manner in which the Petitioner's right to plead such defense can be preserved is by this Court.

(2)

The authority of the Court of Appeals to construe and interpret a Treaty of the United States is discussed hereinafter at pages 10 to 13, but we should like to meet the arguments of the Court of Appeals and show their inapplicability to the present situation.

The Court of Appeals has decided this case on the basis that the ticket delivered to the decedent did not give sufficient notice that the rules of the Convention relating to the limitation of liability were applicable. As the ticket was delivered to the decedent on January 23, 1959, three days before the flight, and as the decedent did insure herself (R 69, 78) for the round trip flight (which facts would seem to clearly take the situation out of the cases cited by the Court of Appeals of *Mertens* v. *Flying Tiger*

Line, Inc., 341 F. 2d 851 and *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494, relating to delivery of tickets) the actual basis of the Court of Appeals decision can only be that the Court felt as a matter of law that the statement on the ticket was printed in too small a print. The semantics involved are apparent as the court refers to the print as "almost unreadable" (Appendix 9a) and as "fine print as almost to defy reading" (Appendix 16a). If the print was "almost readable" it must have been "readable" as is evident from an examination of the tickets (R 14, 15).

As to the necessity of actual notice and the size of the print, the Court of Appeals is reading into the Warsaw Convention conditions which are not there. The language of the Warsaw Convention is clear on its face.

Article 3 (2) of the Convention in clear language imposes upon a carrier absolute liability for death of a passenger, and without limitation as to damages, "if the carrier accepts a passenger without a passenger ticket having been delivered". 49 *Stat.* 3015. This is the only circumstance listed in Article 3 (2) justifying the imposition of this penalty. The Court of Appeals, nevertheless, has held that the penalty in Article 3 (2) applies not only in cases of non-delivery but also where the ticket delivered contains a readable notice but in what it determines is a small point.

Such holding is in direct conflict with the intent of the various nations who are parties to the Treaty as expressed in Article 3 and the corollary Articles 4, 8 and 9. Article 3 (1) sets forth the particulars to be included in the passenger ticket. One of these is a statement that the transportation is subject to the liability rules established by the Convention. With respect to the transportation of baggage and cargo, Articles 4 (3) (h) and 8 (q) specify

the identical statement as one of the particulars to be set forth in the baggage check and air waybill, respectively, 49 *Stat.* 3015, 3016.

While articles 3 (2), 4 (4) and 9 all impose the sanction of absolute unlimited liability in cases of non-delivery of the ticket, baggage check and waybill, Articles 4 (4) and 9 in addition expressly impose the sanction if the baggage check and waybill fail to contain any of the particulars required.

The distinction between the scope of the sanctions in Articles 3 (2), 4 (4) and 9 was recognized in *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756, aff'd 227 F. 2d 282, cert. den. 350 U. S. 989 (1956). In that case the District Court held that the omission of one of the particulars listed in Article (3) (1) from the passenger ticket did not make applicable the penalty of Article 3 (2) for non-delivery. The court relied on the clear intent of the parties to the Treaty as expressed on the contrasting sanctions in Articles 3 (2), 4 (4) and 9 and the Circuit Court of Appeals affirmed upon the basis of the opinion of the District Court.

The history of the drafting of Article 3 confirms that the sanction in Article 3 (2) does not apply merely because the passenger ticket omits any of the particulars listed in Article 3 (1).

The preliminary draft of Article 3 in 1928 contained the following sanction:

> "If, for an international journey, the carrier accepts a passenger without having delivered a passenger ticket, *or if the ticket does not contain the particulars indicated above,* the contract of transportation will none the less be subject to the rules of this Convention, but the carrier will not be entitled to

avail himself of those provisions of this Convention which exclude in whole or in part his liability direct or derived from the omissions of his agents."[3]

The drafting committee at the Warsaw Convention decided however, that the words *"or if the ticket does not contain the particulars indicated above"* should be deleted and, as finally adopted by the Convention the sanction in Article 3 (2) is expressly limited to the situation where no passenger ticket is delivered. IIème Conference Internationale De Droit Privè Aérien, ICAO Doc. 7838, p. 129 (1930).

The intent of the parties to the Treaty that the imposition of this sanction should be limited only to the situation where no ticket is delivered to the passenger is clear. Such intent, furthermore, has been the position of the Government of the United States.

At the Hague Conference in 1955, the United States proposed an amendment to Article 3 (2) to extend the present sanction to situations where the passenger ticket failed to notify the passenger that the Treaty limits the carriers liability for personal injury or death. In the course of the debate the delegates to the Conference repeatedly recognized that the Warsaw Convention does not require any notice in the passenger ticket and that the sanction in Article 3 (2) does not apply where the passenger ticket fails to make reference to the applicability of the Warsaw Convention.[4] The amendment was adopted but never ratified by the United States so that we now have the Court of Appeals

---

3 IIème Conférence Internationale De Droit Privè Aèrien, ICAO Doc. 7838 p. 168 (1930) (Translation and emphasis ours).

4 International Conference on Private Air Law, ICAO Doc. 7686-LC/140 pp. 65-91 (1955).

giving effect to the amendment which was not ratified by the Government of the United States.

The decision of the Court of Appeals, furthermore, is in direct conflict with those authorities which have considered the adequacy of the statement as to the applicability of the Warsaw Convention contained in all of the standard airline transportation documents. It is also in direct conflict with all authorities on the question of whether the penalty of absolute unlimited liability applies where the passenger ticket fails to contain any of the particulars listed in Article 3 (1). See, *Ross* v. *Pan American Airways,* 299 N. Y. 88; *Seth* v. *British Overseas Airways Corporation,* 329 F. 2d 302 (1st Cir. 1964), cert. denied, 379 U. S. 858 (1964); *Grey* v. *American Airlines, Inc.,* 227 F. 2d 282 (2d Cir. 1955), cert. denied, 350 U. S. 989 (1956), affirming 95 F. Supp. 756 (S. D. of N. Y. 1950); *Manufacturers Hanover Trust Co.* v. *American Airlines Inc.,* 23 A. D. 2d 832; *Samuel Montague & Co.* v. *Swiss Air Transport Co* (1966), 1 Lloyds Rep. 323; *Preston* v. *Hunting Air Transport, Ltd.,* 1956 U. S. Av. R 1 (Q. B. D. 1956); Drion, Limitation of Liabilities in International Law Sect. 251 (1954); Shawcross and Beaumont, Air Law Sec. 406 (2d ed. 1951); Goedhuis, National Air-legislation and the Warsaw Convention 156-7 (1937).

(3)

As a treaty the Warsaw Convention is a part of the "supreme Law of the land", U. S. Const. art. VI sec. 2; *Samann* v. *C. I. R.,* 313 F. 2d 461, 463 (4th Cir. 1963); *Wyman* v. *Pan American Airways,* 181 Misc. 963, 43 N. Y. S. 2d 420 (Sup. Ct. N. Y. Co. 1943) affd. 267 App. Div. 947, 48 N. Y. S. 2d 459 (1st Dept. 1944), app. den. 267 App. Div. 983, 49 N. Y. S. 2d 271 (1st Dept. 1944), cert. den. 324 U. S. 882 (1945); *Garcia* v. *Pan American Airways,* 269 App. Div. 287, 55 N. Y. S. 2d 317 (2d Dept. 1945), aff'd. 295 N. Y. 852,

67 N. E. 2d 257 (1946), motion den. 295 N. Y. 981, 68 N. E. 2d 59 (1946), cert. den. 329 U. S. 741 (1946).

As a treaty, the Warsaw Convention is to be interpreted in accordance with the negotiations of the parties and their practical construction of it. In *Factor* v. *Laubenheimer,* 290 U. S. 276, 294-295 (1933), this Court said:

> "In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it. *Nielsen* v. *Johnson,* 279 U. S. 47, 52; *In re Ross,* 140 U. S. 453, 467; *United States* v. *Texas,* 162 U. S. 1, 23; *Kinkead* v. *United States,* 150 U. S. 483, 486; *Terrace* v. *Thompson,* 263 U. S. 197, 223. And in resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight. *Nielsen* v. *Johnson, supra,* 52; *Charlton* v. *Kelly,* 229 U. S. 447, 468."

The decision of the Court of Appeals has ignored the negotiations and the parties' practical construction of the Warsaw Convention. These factors conclusively demonstrate that it is only where the carrier fails to deliver a ticket to the passenger that the convention would impose unlimited liability. The Court of Appeals ignored this clear legislative history.

The Court of Appeals also did not apply this Court's holding that treaties cannot be altered by a court upon any notion of substantial justice and that only the parties to a treaty are competent to change it. Thus, this Court in *The Amiable Isabella,* 19 U. S. (6 Wheat) 1, 70-71 (1821) said:

> "* * * We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the model parts of the treaty, equally give the rule to judicial tribunals. The same powers which have contracted, are alone competent to change or dispense with any formality. * * *"

And, most recently, in *Maximov* v. *United States,* 373 U. S. 49, 54 (1962) this Court said:

> "* * * it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories. * * *"

The deviation from the clear import of the Warsaw Convention is further emphasized by the fact that the uniform ticket here involved was adopted under and in conformance with the Warsaw Convention. It was approved by the Civil Aeronautics Board which is the United States governmental agency dealing with such matters. See, Northwest Airlines Inc. Local and Joint International Passenger Rules and Regulations Tariff No. 2 filed with the Civil Aeronautics Board under ATB No. 23 C.A.B. No. 81.

CONCLUSION

It is respectfully submitted that this Petition should be granted and the Writ sought should be issued.

JOHN J. MARTIN
WILLIAM M. KEEGAN
Counsel for Petitioner

APPENDIX A

Extracts from the Convention for Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol, signed at Warsaw, Poland, on October 12, 1929

(49 *Stat.* 3000; T. S. 876)

"CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I—PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be sub-

ject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II.—BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22 (2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

Appendix A

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

* * *

Article 8

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22 (2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 (*a*) to (*i*), inclusive, (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability."

APPENDIX B

Order of Remittitur, dated December 28, 1967, of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of December in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR December 28, 1967

ELIZABETH ANNA EGAN & ano., &c.,
Plaintiffs,

vs.

KOLLSMAN INSTRUMENT CORP. & ano.,
Defendants.

ELIZABETH ANNA EGAN & ano., &c.,
Appellants,

vs.

AMERICAN AIRLINES, INC.,
Respondent.

Appendix B

BE IT REMEMBERED, That on the 17th day of December in the year of our Lord one thousand nine hundred and sixty-six, Elizabeth Anna Egan & ano., &c., the appellants in this cause, came here unto the Court of Appeals, by Shatzkin & Cooper, their attorneys, and filed in the said Court a [Notice of Appeal and] return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And American Airlines, Inc., the respondent—in said cause, afterwards appeared in said Court of Appeals by Bigham, Englar, Jones & Houston, its attorneys.

Which said [Notice of Appeal and the] return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Mr. Burton S. Cooper, of counsel for the appellants, and by Mr. Robert F. Ewald, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court [appealed from] herein be and the same hereby is reversed, with costs in all courts, and the case remitted to the Supreme Court, Kings County, for further proceedings in accordance with the opinion herein. Question certified answered in the negative.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, with costs &c. Question certified answered in the negative, as aforesaid.

---

* Matter in brackets stricken.

Appendix B

And hereupon, as well the [Notice of Appeal and] return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals of the State of York

Court of Appeals, Clerk's Office,)
Albany, December 28, 1967.)

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ Raymond J. Cannon
Clerk

[Seal]

APPENDIX C

Opinion of the Court of Appeals of the State of New York

ELIZABETH A. EGAN et al., as Administrators of the Estate of EILEEN M. SEITER, Deceased, Plaintiffs, v. KOLLSMAN INSTRUMENT CORP. et al., Defendants.

ELIZABETH A. EGAN et al., as Administrators of the Estate of EILEEN M. SEITER, Deceased, Appellants, v. AMERICAN AIRLINES, INC., Respondent.

Decided December 28, 1967.

APPEAL, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of said court entered July 5, 1966, which (1) dismissed an appeal from so much of an order of the Supreme Court at Special Term (BENJAMIN BRENNER, J.; opinion 44 Misc. 2d 348), entered in Kings County, as denied a motion by plaintiffs to dismiss the third defense of defendant-respondent American Airlines, Inc., and (2) affirmed, insofar as appealed from, an order of said court which, upon renewal of the motion, adhered to the original decision. The following question was certified: "Was the order of this court, dated July 5, 1966, properly made."

Burton S. Cooper for appellants.

Robert F. Ewald and *John J. Martin* for respondent.

Chief Judge FULD. Mrs. Eileen M. Seiter was killed when the American Airlines plane on which she was a passenger crashed as it approached La Guardia Airport on February 3, 1959. Her administrators have brought this action for wrongful death and American has raised as an affirmative defense the limitation of liability provisions of the War-

saw Convention (49 U. S. Stat., pt. 2, p. 3000, hereinafter referred to as the "Convention"). Two questions are presented by this appeal: Was the final leg of the flight —from Chicago to New York City —to be deemed "international transportation" for purposes of the Convention so as to render it applicable to the present action and, if it was, had the carrier sufficiently complied with the Convention's notice requirements to permit it to limit its liability?

Mrs. Seiter had purchased an airline ticket for a round trip between New York City and Vancouver, Canada. The ticket scheduled her on successive flights of Northwest Airlines and United Airlines with stopovers at Seattle (west and eastbound) and at Chicago (eastbound). On the face of the ticket, below the name of the passenger, the following footnote appeared in exceedingly small, almost unreadable (*4½ point*) print:

> "Carriage/Transportation under this Passenger Ticket and Baggage Check hereinafter called 'ticket' is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage/Transportation by Air signed at Warsaw, October 12, 1929, if such Carriage/Transportation is 'international carriage/transportation' as defined by said Convention."[1]

---

1. The outside back cover of the ticket also contained a statement of "CONDITIONS OF CONTRACT," likewise printed in miniscule type, reading in part as follows:

(*Footnote continued on following page*)

Appendix C

Mrs. Seiter arrived in Vancouver on January 26, 1959, as scheduled, but, on February 3, when she was ticketed to return to New York, she discovered that all flights out of Vancouver had been cancelled because of inclement weather. Instead of waiting for the next available flight she proceeded to Seattle by bus, obtaining a refund check from Northwest Airlines for that portion of her journey when she reached that city.

Mrs. Seiter reached Seattle in time to permit her to take off on the Northwest flight to Chicago for which she had been originally scheduled. Reaching Chicago too late to make her scheduled connection to New York City, she presented her ticket to Northwest Airlines and received a new one for passage on an American Airlines flight to La Guardia Airport. The new ticket—under the heading "COMPLETE ROUTING THIS TICKET AND CONJUNCTION TICK-

---

(Footnote continued from preceding page.)

"(2) (a) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called 'the Convention') unless such carriage is not 'international carriage' as defined by the Convention. (See carrier's tariffs, conditions of carriage for such definition). Carrier's name may be abbreviated in the ticket, the full name and its abbreviation set forth in carrier's tariffs, conditions of carriage, regulations or timetables; and carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; and for the purpose of the Convention the agreed stopping places (which may be altered by carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth in this ticket and any conjunction ticket issued herewith, or as shown in carrier's timetables as scheduled stopping places on the passenger's route."

ET(S)''—specified the origin and destination as ''NY'' and expressly recited that it was ''ISSUED IN EXCHANGE FOR'' the original ticket, the fare being listed at the figure which had initially been paid for the entire round trip. Mrs. Seiter boarded respondent American's aircraft which, as stated above, crashed while attempting to make a landing at La Guardia.

The present action, for wrongful death, was brought against American Airlines and two other defendants—one the manufacturer of an assertedly defective altimeter and the other the assembler of the aircraft. We are, however, concerned solely with the sufficiency of American's (third) affirmative defense which asserts an ''exemption from and limitation of liability in accordance with all of the applicable provisions of said Convention''. The court at Special Term upheld that defense, denying the plaintiffs' motion to dismiss it, and the Appellate Division unanimously affirmed Special Term's order, granting leave to appeal on a certified question.

As both courts below recognized, answer to the underlying question—whether the flight from Chicago to New York City was ''international transportation'' under the Convention—depends upon the nature of the contract between the carrier and its passenger.[2] When it provides for ''in-

---

2. Article 1 of the Convention, which bears on its applicability, reads as follows:

''(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratitous transportation by aircraft performed by an air transportation enterprise.

(*Footnote continued on following page*)

ternational" transportation, "whether or not there be a break in the transportation" (art. 1, subd. [2]), all flights taken under it are governed by the Convention. (See, e.g., *Ross* v. *Pan Amer. Airways,* 299 N. Y. 88; *Block* v. *Compagnie Nationale Air France,* 386 F. 2d 323, 332. In the *Ross* case, our court held that "the Convention becomes the law of the carriage when the 'contract' of the parties provides for passage between certain described termini. When such is the contract, then the Convention has automatic full impact, by its own terms" (299 N. Y., at p. 97).

(*Footnote continued from preceding page*)

"(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

"(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party."

Appendix C

The Convention's emphasis on the contract actually "made" appears to have been specifically designed to prevent any subsequent intervening circumstances from affecting the result. The reason is manifest; as one commentator put it, "[t]his prescription possesses, for the parties involved, the appreciable advantage of settling in advance the application of the Warsaw Convention, thus becoming independent of fortuitous events". (Coquoz, Le Droit Prive Internationale Aerien, p. 95; see, e.g., Convention, art. 3, subd. [1], par. [c], *infra*, p. 168, n. 4.)

The contract embodied in the original ticket issued in this case was undoubtedly for international transportation since, in the words of the Convention (art. 1, subd. [2]), it provided for "an agreed stopping place within a territory * * * of another power". Whether or not Mrs. Seiter might have been able to rescind this contract and enter into a wholly new one of an entirely domestic character in Seattle, the simple fact is that she chose not to do so.[3] The remainder of her journey—from Seattle to Chicago and from Chicago to New York—was performed under the original contract; and since, as already noted, it provided for international transportation, it was subject to the Convention.

---

3. That she took out a $50,000 insurance policy in Seattle has, as Special Term declared, "little bearing on [the passenger's] intent relative to termination of the contract for international transportation or of the character of the trip from Seattle to New York in terms of internal or international passage." Mrs. Seiter may have purchased the $50,000 policy because she desired coverage in addition to the $25,000 of insurance (to cover the round trip) which she had procured before leaving New York, in view of the forecast of bad weather. Its purchase certainly created no inference that she considered the round trip at an end.

The plaintiff contends, however, that, in view of the bus trip from Vancouver, the later flights were not performed by "successive air carriers" as required by the Convention (art. 1, subd. [3]) and that, in order for a subsequent domestic flight to be subject to the Convention, the international transportation must be "completely by air". It may well be true—although we need not now consider the matter—that, had the parties initially agreed that the journey from Vancouver to Seattle would be by bus, the Convention would not have been applicable to the later flights. (See Drion, Limitation of Liabilities in International Air Law, p. 52.) But Northwest was unquestionably named as a successive air carrier on the ticket originally issued pursuant to that contract and, so long as the flight was performed under it, the Convention applies.

Nor can there be any doubt that the American Airlines flight from (Chicago to New York was also performed under the original contract. It is to be noted that it was not Mrs. Seiter but the contracting airline, Northwest, which obtained the ticket out of Chicago for her. Examination of that ticket discloses that it was a part of a "complete routing" from New York to Vancouver, and back again to New York, at the fare originally paid. The respondent American may not be regarded as an outside party, a stranger to the contract for international carriage in view of the fact that the passenger had agreed in that contract that Northwest "may without notice substitute alternate carriers or aircraft" (Conditions of Contract, Item No. [7]).

It is equally clear that American did not have to be an actual party to such original contract in order to obtain the benefits of the Convention: subdivision (1) of article 30 specifically provides that any successive air carrier who

aecepts passengers under a contract for international transportation is "subject[ed] to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation".

This brings us to the plaintiffs' further argument that, even if the Warsaw Convention applies, the carrier is not entitled to invoke the provisions limiting its liability because the ticket delivered to Mrs. Seiter did not give sufficient notice that the rules of the Convention relating to the limitation of liability were applicable.

Under article 3 (subd. [1], par. [e]) of the Convention, an airline is required to deliver a passenger ticket which contains a "statement that the transportation is subject to the rules relating to liability established by this convention".[4] The ticket before us did contain, in footnotes on

---

4. Article 3 provides:

"(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of these provisions of this convention which exclude or limit his liability."

the several coupons, such a statement (*supra*, p. 164) but, as is apparent from inspection, it is in such exceedingly small and fine print as almost to defy reading.[5] Thus, although there was literal compliance with the prescription of article 3, the question arises whether such compliance satisfies the Convention's demands when viewed in the light of its over-all purposes. We do not believe that it does. In our judgment, a statement which cannot reasonably be deciphered fails of its purpose and function of affording notice and may not be accepted as the sort of statement contemplated or required by the Convention.

In support of its argument to the contrary, the respondent points to *Ross* v. *Pan Amer. Airways* (299 N. Y. 88, *supra*). The ticket there under consideration, not too unlike the one before us, had been delivered not to the passenger personally but to a third person who had been in charge of all arrangements up to the time of the plane's departure. In holding that delivery to the latter was sufficient, the court observed that, when a ticket provided for international transportation, the Convention applied "by its own terms and not because the parties have so agreed" and

---

5. One court has described the notice in this way (*Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237, 243, affd. 370 F. 2d 508):

"The footnotes printed in microscopic type at the bottom of the * * * coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' crowded on the [outside back cover], are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed."

that the carrier need show no more than delivery of the ticket (p. 97). As already indicated, the sole question presented concerned the adequacy of such delivery. No argument was made by the passenger as to the form of the ticket or the readability of the statement as to liability. And, indeed, in 1964, 15 years later, the court decided *Eck* v. *United Arab Airlines* (15 N Y 2d 53) and, despite the carrier's strong reliance on the rationale and language of *Ross,* expressly rejected a "strictly literal reading" of the Convention or any of its provisions. Remarking the changes which had occurred in the years since the Convention had been drafted and stressing the vital canon of construction that, when a treaty is invoked, *"what is to be applied are its principles if its purposes are to be observed"* (emphasis in original), the court declared (p. 59):

> "The reasoning which supports a strictly literal reading of the phrase might not have done violence to the over-all scheme and design of the Convention under the conditions existing when the treaty was drafted. At that time it would have been in harmony with the methods under which the carriers were operating and with the objectives of the Convention. [Case cited.] Now, however, almost a half century later, when the carriers have radically changed their methods of booking passage, the whole scheme of the treaty in relation to international air travel makes it imperative to analyze this self-executing treaty in assigning meaning to any part of it. In doing this it must be recognized that the literal wording of one particularly applicable section of the entire treaty should not set the limits of our interpretive examination."

And, even more recently, the United States Court of Appeals for the Second Circuit, confronted with the precise problem now before us, decided that a ticket, containing a statement (as to the carrier's liability) virtually identical in content and form that in this case, failed to give passengers the notice required by the Convention. (See *Lisi* v. *Alitalia-Linee Aeree Italiane,* 370 F. 2d 508, *supra,* cert. granted 36 U.S. Law Week 3189.) After observing out that "[t]he Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier", the court, in an opinion by Judge KAUFMAN, went on to say that "the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket * * * which give[s] him notice" of a "very substantially" limited liability and affords him "the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit" (pp. 512-513). Pointing out that the statement on the tickets under consideration was printed in such a manner as to be virtually unnoticeable, and unreadable, the court concluded, as already noted, that the tickets did not give the passengers the required notice.

Other interpretations of article 3 has also taken into account the fact that a traveler today is likely to undertake international travel quite casually and without realizing the drastically limited protection he is receiving when compared to that provided by domestic flights. (See *Mertens* v. *Flying Tiger Line,* 341 F. 2d 851 [2d Cir.]; *Warren* v. *Flying Tiger Line,* 352 F. 2d 494 [9th Cir.]; but see *Seth* v. *British Overseas Airway Corp.,* 329 F. 2d 302, 307 [1st Cir.].) In the *Mertens* case (341 F. 2d 851, *supra*), the court read article 3 "to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable

opportunity to take measures to protect himself against the limitation of liability" (p. 856) and held that the requirement was not met by reason of the fact, among others, that the ticket delivered was "printed in such a manner as to virtually be both unnoticeable and unreadable" (p. 857). In addition, the Civil Aeronautics Board in 1963 adopted a regulation requiring (1) that the statement as to limitation of liability follow the far more clear and specific language specified by the board; (2) it "be printed in type at least as large as ten point modern type [as contrasted with the 4½ point type in this case] and in ink contrasting with the stock"; and (3) that a similar statement be placed at all ticket counters in letters at least one fourth of an inch high (Code of Fed. Reg., tit. 14, § 221.175).[6]

These decisions and regulations are suggestive of a national policy requiring that air carriers give passengers clear and conspicuous notice before they will be permitted to limit their liability for injuries caused by their negli-

---

6. The language of the statement which was mandated by the CAB was similar to that provided for in the amendment to article 3 appearing in the so-called Hague Protocol to the Convention executed in 1955. (See 3 CCH Aviation L. Rep. par. 27,106.) This Protocol was never ratified by the Senate, apparently because its most significant feature, increasing the maximum liability to $16,000, was considered inadequate. It is of more than passing interest that in 1965 our Government in a Notice of Denunciation declared that it opposed the Convention's low limits on liability and indicated an intention to withdraw from the Convention unless an agreement were reached (among the world's international air carriers) to raise the limit to $75,000 and that in May of 1966 such an agreement was executed. (See CCH Aviation L. Rep. par. 27,130; The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation, 32 J. Air L. & Com. 243.)

gence. An examination of the ticket forms which the respondent used, in the light of that policy, can only lead one to conclude that Mrs. Seiter was not sufficiently apprised of the consequences which would result from the fact that her flight happened to carry her outside of the United States. Despite the fact that the Convention was applicable to her journey, the carrier's failure to give the requisite notice prevents it from asserting a limitation of liability. Accordingly, the plaintiff's motion to dismiss the third affirmative defense should have been granted.

The order of the Appellate Division should be reversed, with costs in all courts, and the certified question answered in the negative.

Judges VAN VOORHIS, BURKE, SCILEPPI, BERGAN, KEATING and BREITEL concur.

Order reversed, with costs in all courts, and case remitted to Supreme Court, Kings County, for further proceedings in accordance with the opinion herein. Question certified answered in the negative.

APPENDIX D

Opinion dated October 28, 1964 of Mr. Justice Brenner, Supreme Court of the State of New York, County of Kings, on Original Motion

This is a negligence suit which arose out of the tragedy of February 3, 1959, when an American Airlines airplane crashed into the East River while attempting to land at LaGuardia Airport. The decedent was a passenger on said plane.

Plaintiffs' effort to strike the third defense which asserts defendant's limitation of liability for injuries sustained contained in the Warsaw Convention is based on the theory that defendant breached the contract for international transportation. The decedent originally purchased a round trip ticket for passage from New York to Vancourver, British Columbia, via Seattle, Washington, and from Vancouver to New York, via Seattle and Chicago. Decedent arrived as scheduled in Vancouver and on February 3, 1959, she attempted to there board a plane for Seattle and found that all flights departing from Vancouver were canceled due to inclement weather. She thereupon took a bus from Vancouver and, on arrival at Seattle, obtained a refund for the proportionate share of the ticket price represented by the journey from Vancouver to Seattle and proceeded on the originally scheduled flight from Seattle to New York, via Chicago.

Now plaintiffs do not question that the contract provided for international transportation and that if the flight from Vancouver to Seattle had proceeded as scheduled the decedent would be subject to the Warsaw Convention under the contract. They contend, however, that the contract was breached when the flight from Vancouver to Seattle was

canceled and that it was subsequently rescinded when payment for the unused part of the plane ticket was refunded and a new contract for purely domestic travel from Seattle to New York in effect substituted. Though they do cite legal precedent to establish their right to rescind on breach of contract, they cite no Canadian or New York law to substantiate their claim that a breach of contract did result on the basis of the agreed facts and the events which occurred at Vancouver and Seattle. In my view of these events, no breach did in fact occur and, and on the contrary, the parties actually complied with its terms.

The rules and regulations of Northwest Airlines, from whom decedent purchased the ticket, were made specifically applicable to and part of the contract by virtue of the printed conditions on the back of the ticket so purchased. They in effect provide that a cancellation, postponement or delay (however the actions of the airlines at Vancouver may be regarded) do not constitute a breach of the contract by the carrier. The carrier under said rules and regulations was given the absolute right without notice to make such cancellation, postponement or delay because of undisputed meteorological conditions. Plaintiffs' argument that even though the airline had the right to do so under the contract, there was nonetheless a breach thereof, and a subsequent right to rescind is therefore incomprehensible, as is their further argument that the involuntary refund (the refund slip is designated as such) constituted agreement on the part of the carrier to rescind though Rule 11 of the aforesaid rules specifically provides for such refund due to cancellation, postponement, &c.

The actions of the parties would thus appear to be consonant with and pursuant to the terms of the subsisting contract rather than a breach or termination thereof. The

fact that decedent continued her flight from Seattle to New York on the original ticket, while not determinative of the question, is worthy of consideration. (It was pointed out that decedent was able to catch her original flight.) However, she did not cash in the remainder of her original ticket and did not purchase a new ticket for a flight from Seattle to New York and, instead, made use of the original ticket for the return flight. This does demonstrate that there was no intent on her part to rescind (even assuming that she had the right to do so). Finally, the refund demanded and received by her under that very ticket for the unused portion thereof would appear to be a determination on her part to enforce her rights thereunder and perpetuate rather than to rescind them. I must conclude on the agreed facts that the defendant did not breach and that the parties did not rescind the contract for "international transportation" and that consequently the Warsaw Convention provision as to limitation of liability does apply. The third defense cannot be stricken.

By its second defense, sought to be stricken, the defendant claims that article 29 of the convention, which bars suits not timely commenced, is actually a condition precedent to the right of suit rather than a time limitation for such suit. It cites several cases which involve statutory actions to recover compensation wherein the courts hold that these time periods do constitute a condition precedent rather than a limitation. They so hold because the right of action created by the statute and incorporated therein set the time limitation as a condition precedent to the maintenance of the suit and is thus quite independent of practice remedies (Hill v. Board of Supervisors of Rensselaer County, 119 N.Y. 344; Johnson v. Phoenix Bridge, 197 N.Y. 316). Also cited is Balzano v. Port of

New York Authority (232 N.Y.S. 2d 776), which similarly upheld the time limitation as a condition precedent. Here, again, the same statute which contained the limitation also created the remedy so that the limitation was in effect a restriction on the remedy created by the statute.

In the present instance, however, the Warsaw Convention does not create the remedy as the remedy is actually contained either in the common law or, as in the case at bar, the Decedent Estate Law of New York which does not provide any time limitation. The two-year limitation of time set out in article 29 of the convention cannot therefore be construed as a condition precedent, and since the saving clause of section 205, CPLR, is applicable to this suit which was timely commenced following termination of the action in the Federal Court, the second affirmative defense must be stricken.

The motion to strike the first defense is consented to. The motion to strike is granted as to the second defense and denied as to the third defense. Settle order on notice.

APPENDIX E

Opinion dated September 10, 1965 of Mr. Justice Brenner, Supreme Court of the State of New York, County of Kings, on Renewal of Original Motion

Plaintiffs, claiming newly discovered evidence, move for leave to renew their motion to dismiss the third affirmative defense of the defendant American Airlines, Inc., which alleges the provision for limitation of liability under the Warsaw Convention. The motion is granted and upon such renewal the original decision is adhered to.

Plaintiffs assert that following the denial of their motion it has been discovered that the decedent purchased aircraft trip insurance in Seattle on her return trip though she had already purchased aircraft trip insurance when she first left New York. They claim that this additional evidence establishes that the decedent regarded the original agreement for round-trip passage as having ended and her trip from Seattle to New York as a "single operation" and no longer a continuing flight in "international transportation," thus rendering inapplicable the provisions of the Warsaw Convention.

Under chapter 1, article, subdivision (3), of the Warsaw Convention, where there are successive air carriers, the intent of the parties is material; but the purchase of additional insurance has little bearing on decedent's intent relative to termination of the contract for international transportation or of the character of the trip from Seattle to New York in terms of internal or international passage.

I have already pointed out in my original opinion (44 Misc. 2d 348) that the decedent, after taking a bus from Vancouver to Seattle, did not cash in the ticket which she

retained but merely obtained a refund for the Vancouver to Seattle portion of that ticket, and proceeded to New York on that ticket which clearly called for international transportation under article 1, subdivision (2), of the Warsaw Convention. There may be numerous reasons why she purchased the additional insurance other than that asserted, namely, that she considered the round trip at an end and the original flight insurance no longer in effect. She may have purchased it because she wished additional coverage in view of the forecast of bad weather or because she believed that in view of the interruption of the flight, the original flight insurance might not apply. (Parenthetically, the estate has collected the proceeds of both the New York and the Seattle policies.) I consider that the determining factor here is that she pursued her right to enforce her contract by continuing her trip to New York on the original ticket. This intent to continue rather than terminate the original trip is further demonstrated by the fact that at no time did the decedent attempt to obtain a refund for the remaining portion of her ticket.

This view of the legal implication applied to the change of airlines in Chicago since the ticket from Chicago to New York on an airline other than the one with which she had originally contracted was made as part of her original contract. It was not she but the contracting airline which obtained that ticket for her and this did not in any way change the international character of the trip. Thus the defendant American Airlines is not an outside party, unjustly garnering the advantage of the limitation provided by the convention. The decedent in her contract of passage agreed to the reservation therein on the part of Northwest to substitute a carrier, such as this defendant, under specified conditions. The latter stands in the shoes

of and is entitled to invoke the liability limitations to which decedent had agreed.

Much is made of the recent case of Eck v. United Arab Airlines (15 N.Y. 2d 53) in which the Court of Appeals liberally interpreted a provision of the Warsaw Convention dealing with jurisdiction in an action under the convention. The court in that case did not in any way refer to the limitations of liability provisions nor to the definitions of international transportation in the convention. It would therefore be presumptuous of this court to disregard what appears to be the clear provisions of an international treaty to which the United States Government is a party.

The plaintiffs also argue that to treat this decedent differently from the other unfortunate passengers aboard the ill-fated airplane, making what was clearly a domestic flight from Chicago to New York, would be a denial of the constitutional guarantees of the equal protection of the laws. That argument was rejected in Grey v. American Airlines, Inc. (95 F. Supp. 756) in which it was held permissible to treat some passengers on the same flight as being international transportation and some as being in domestic transportation.

There is little doubt of the pressing need to liberalize the limitations and to expand recovery under the Warsaw Convention but these reforms cannot be acomplished through judge-made law which would conflict with well established principles of contract law and treaty obligations. Settle order.

APPENDIX F

Memorandum Opinion dated July 5, 1965, of the Supreme Court of the State of New York, Appellate Division, Second Department

By Ughetta, Acting P.J., Christ, Brennan, Hill and Hopkins, JJ.

Egan, plaintiff v. Kollsman Instrument Corporation, defendant.

In a consolidated action to recover damages for wrongful death, plaintiffs appeal from portions of two orders of the Supreme Court, Kings County, as follows: (1) from so much of the first order, entered November 12, 1964, as denied their motion to dismiss as legally insufficient the third defense of defendant American Airlines, Inc.; and (2) as limited by their brief, from so much of the second order, entered September 23, 1965, as, upon renewal of the motion, adhered to the original decision.

Appeal from first order dismissed, without costs; such order was superseded by the second order granting renewal of the motion.

Order of September 23, 1965, in so far as appealed from, affirmed, with $10 costs and disbursements.

The defense in question is that plaintiffs' right of recovery is subject to the exemption and monetary liability limitation of the Warsaw Convention. In our opinion, appellants have at best shown that this defense raises an issue of intention as to whether the original contract for air transportation was so changed after the appellants' intestate had reached Vancouver that the convention was not applicable to the last leg of her return passage to New York. Determination of that issue should await trial of the action.